Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ANTONIO C. SIMONELLI,
PETITIONER

v.

THE UNIVERSITY OF CALIFORNIA AT BERKELEY; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; THE SCHOOL OF LAW (BOALT HALL); JOHN P. DWYER, DEAN OF THE SCHOOL OF LAW; VICTORIA ORTIZ, DEAN OF STUDENTS OF THE SCHOOL OF LAW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title II of the Americans With Disabilities Act (42 U.S.C. § 12132) ("ADA") provides that disabled persons cannot be excluded from or denied the equal benefits of public services. When necessary, Title II requires a public entity to provide accommodations to enable disabled persons to obtain equal services. This case concerns the ability of disabled persons to obtain the accommodations needed to benefit from post-secondary higher education at law school.

1. Whether the Ninth Circuit's decision that a public entity meets its obligations by substantial but unsuccessful efforts to provide an agreed-upon accommodation conflicts with the Fifth Circuit's decision in Bennett-Nelson v. Louisiana Board of Regents, 431 F.3d 448, 454-455 (5th Cir. 2005) that the cause of a failure to accommodate is irrelevant.

2. Whether the Ninth Circuit's decision conflicts with the ADA's interactive process and the regulation that the accommodation requested by the disabled individual must be given primary consideration because it allows the University to avoid liability for not providing the agreed-upon accommodation by claiming that other accommodations might have been possible.

3. Whether the Ninth Circuit's decision undermines the enforcement of the ADA by disallowing attorneys fees for a partial settlement entered into the court record with judicial approval and oversight and conflicts with the reasoning set out in the Supreme Court case *Buckhannon Bd. & Care Home,Inc. v. West Virginia Dept of Health & Human Resources*, 532 U.S. 598 (2001),600-609, that attorneys fees are allowable where there is a judicially sanctioned change in the legal relationship of the parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 7

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 20

APPENDIX

Circuit Court Opinion 1a
District Court Order 5a
Order Denying Rehearing 36a
Transcript Excerpts 37a
District Court Order 3/19/2003 ..... 45a
District Court Order 6/2/2003 ..... 46a

TABLE OF AUTHORITIES

Page

CASES

ALEXANDER V. CHOATE, 460 U.S. 287, 295-297 (1985) 10, 13
BARTH V. GELB, 2 F.3D 1180, 1187 (C.A.D.C.1993) 16
BENNETT-NELSON V. LOUISIANA BOARD OF REGENTS, 431 F.3D 448, 454-455 (5TH CIR. 2005) 11, 12
BORKOWSKI V. VALLEY CENTRAL SCHOOL DIST., 63 F.3D 131, 138 (C.A.2 1995) 16
BUCKHANNON BD. & CARE HOME, INC. V. W. VA. DEP'T OF HEALTH & HUMAN RES. 532 U.S. 598, 603-604 (2001) 17, 19, 20
DUVALL V. COUNTY OF KINSAP, 260 F.3D 1124, 1139 (9TH CIR. 2001) 13
HEWITT V. HELMS, 482 U.S. 755, 760 (1987) 17
REED V. LEPAGE BAKERIES, INC., 244 F.3D 254, 259 (C.A.1 2001) 15
STERN V. UNIVERSITY OF OSTEOPATHIC MEDICINE AND HEALTH SCIENCES, 220 F.3D 906, 909 (8TH CIR. 2000) 16
US AIRWAYS, INC. V. BARNETT, 535 U.S. 391, 401-402 (2002) 15

STATUTES

28 U.S.C. § 1254 ..... 1, 2
28 U.S.C. § 1331 ..... 7, 10
28 U.S.C. § 2101 2
29 U.S.C. § 794a(b) 7
42 U.S.C. § 12117 7
42 U.S.C. § 12132 2
42 U.S.C. § 12134 2
42 U.S.C. § 12205 17
42 U.S.C. § 2000d-7(a) 7

RULES

U.S.SUP.CT. RULE 13.1 2

U.S.SUP.CT. RULE 13.3 2
U.S.SUP.CT. RULE 33.1(D) 21
U.S.SUP.CT. RULE 33.1(H) 21

REGULATIONS

28 C.F.R. § 35.104 6
28 C.F.R. § 35.107(a) 3, 4
28 C.F.R. § 35.107(b) 3, 4, 17
28 C.F.R. § 35.160 ..... 4, 5
28 C.F.R. § 35.160(b)(1) 4, 11, 12
28 C.F.R. § 35.160(b)(2) 4, 5, 14
28 C.F.R. § 35.164 ..... 5, 6, 12, 14

PETITION FOR WRIT OF CERTIORARI

Antonio C. Simonelli ("Simonelli" or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on July 21, 2009.

OPINIONS BELOW

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit filed July 21, 2009, 2009 WL 2157151, is not officially published, and is reprinted at App. pages 1a-4a, *infra*.[1] The Orders of the United States District Court for the Northern District of California denying plaintiff's motion for a new trial and for partial attorney fees are not officially published and are reprinted at App. Pages 5a-35a, *infra*. The Order of the United States Court of Appeals for the Ninth Circuit denying rehearing was filed September 8, 2009 and is reprinted at App. page 36a, *infra*.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 21, 2009. The Court of Appeals granted Petitioner's request for an extension of time to file a petition for rehearing and a suggestion for rehearing en banc and a timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on August 11, 2009. On September 8, 2009, the Ninth Circuit denied the Petition for Rehearing and rejected the Suggestion for

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[1] "App." refers to the Appendix to this Petition.

Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S.Sup.Ct. Rule 13.1 and 13.3.

RELEVANT PROVISIONS INVOLVED

Section 202 of Title II of the Americans With Disabilities Act ("ADA") (42 U.S.C. § 12132) provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 204 of Title II of the ADA (42 U.S.C. § 12134) provides:

> (a) In general
>
> Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of hbthe Secretary of Transportation under section 12143, 12149, or 12164 of this title.
>
> (b) Relationship to other regulations
>
> Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be

consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

Code of Federal Regulations, Title 28, Part 35, Subpart A – General (28 C.F.R. Part 35) provides:

35.107 Designation of responsible employee and adoption of grievance procedures.

(a) Designation of responsible employee. A public entity that employs 50 or more persons shall designate at least one employee to

> coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.
>
> (b) Complaint procedure. A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

Code of Federal Regulations, Title 28, Part 35, Subpart E – Communications (28 C.F.R. Part 35) provides:

> § 35.160 General.
>
> (a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.
>
> (b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

* * *

§ 35.164 Duties

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with

disabilities receive the benefits or services provided by the public entity.

Code of Federal Regulations, Title 28, Part 35, Subpart A General (28 C.F.R. Part 35) provides:

§ 35.104 Definitions.

For purposes of this part, the term —
* * *

Auxiliary aids and services includes—

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

STATEMENT

This is a case involving a failure to accommodate in public educational services under the American's with Disabilities Act ("ADA"). The district court had jurisdiction under the Civil Rights Remedies Equalization Act (42 U.S.C. § 2000d-7(a)), section 505(b) of the Rehabilitation Act of 1973 (29 U.S.C. § 794a(b)), section 107 of the Americans With Disabilities Act of 1990 ("ADA") (42 U.S.C. § 12117) and under 28 U.S.C. § 1331.

The University of California has 226,000 undergraduate and graduate students.[2] Nationally, students with disabilities represent approximately 11% of students in postsecondary schools.[3] This represents a substantial growth in the number of disabled students in postsecondary education.[4]

Petitioner was a disabled student at the University of California, Boalt School of Law. Petitioner commenced his legal studies in Fall 2000. To accommodate Petitioner's disability, the University agreed to provide Petitioner his law school materials in large print. Notwithstanding this agreement,

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[2] Statistical summaries of student enrollment are published by the University and available on its website at http://www.ucop.edu/ucophome/uwnews/stat/.

[3] Government Accountability Office, Higher Education and Disability, *Report to the Chairman, Committee on Education and Labor, House of Representatives* (October 2009) Report GAO-10-33, at p. 8, available at http://www.gao.gov/products/GAO-10-33.

[4] *Ibid.* The GAO reports that, from 1999 to 2007, California reported a 20 percent increase in disabled students and New York reported a 40 percent increase in the number of undergraduate and graduate students with disabilities. *Ibid*

University only managed haphazard compliance with its commitments. Typically Petitioner received the materials weeks late, after the class sessions to which they related. III ER 548-549; see also III ER 543-545.[5]

Receiving materials late impacted Petitioner's ability to study and participate in class. III ER 542:22-543:22. Without the materials Petitioner was "totally lost in class". III ER 543:21. He was unable to discuss the materials with other students. III ER 543:23-544:2. He could not follow along with the lectures. III ER 564:1-6.

By the end of Petitioner's first semester of law school, Petitioner had to delay his course examinations because he had not received his materials in time to study for the tests. III ER 552:2-9. For his second semester in Spring 2001, Petitioner took a reduced course load. III ER 552:16-21, 553:8-19. Again, however, Petitioner did not receive his course materials on time. III ER 553:20-554:1. By the end of the Spring 2001 semester, Petitioner had sill been unable to complete examinations from the Fall semester and could not take the Spring semester examinations either. III ER 557:17-23. Petitioner ultimately took some examinations over the summer. III ER 558:1-4.

The problems with late materials continued in Petitioners third semester, Fall 2001. III ER 562:13-24. Petitioner contacted the University's ADA Compliance Officer, Ward Newmeyer, about the chronically late materials. III ER 565-566, 486-487. Newmeyer conducted an investigation during the remainder of the

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[5] "ER" refers to the volume and page of the Excerpts of Record filed in the Ninth Circuit.

Fall 2001 semester. II ER 301, III ER 566, 427-428, 461-462.

On January 17, 2002, Newmeyer issued a report on his investigation. III ER 567-568, IV ER 698. Newmeyer's report (directed to Petitioner's counsel) stated: "I have concluded my investigation and found that you are correct that the University has agreed to provide Mr. Simonelli with reproductions of course materials in large (32 point) type." Newmeyer also stated: "A new procedure is now in place to provide copies to Mr. Simonelli for the upcoming semester, and DSP[6] is confident that it will result in timely, legible copies." IV ER 698.

The University still failed to provide Petitioner timely large-print materials during the Spring 2002 semester. III ER 570-571, 572-573, 574-575, 586:21-587:2, 492:3-7. However, as a result of court-supervised settlement agreements after Petitioner initiated this action, the University began using an outside copy service (Copy Central) to enlarge the course materials. III ER 576:4-17. Once the University began using Copy Central, Petitioner received his course materials on time. III ER 585:2-23, 579-580, 583, 379:10-15, 387:7-25.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision establishes standards that will govern how the University of California accommodates disabled students. The standards set by the Ninth Circuit will, similarly, affect how disabled students will assess their rights and the

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[6] "DSP" refers to the Disabled Students Program at the University of California at Berkeley.

University's obligations. The Ninth Circuit's decision will impact the lives and education of approximately 25,000 disabled students in the University of California system. See *supra* p. 7. The dramatic and harmful effect of this decision on an institution of the size of the University of California presents a question of substantial importance governing the post-secondary education of disabled students that this Court has not resolved. Similarly, the Ninth Circuit's decision—available on-line, even if not officially-published—will influence the actions of other entities and the how disabled students throughout the country will understand their rights.

I. ON THE FIRST QUESTION PRESENTED, THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN BENNETT-NELSON V. LOUISIANA BOARD OF REGENTS THAT THE EFFECT OF A FAILURE TO ACCOMMODATE IS THE STANDARD AND THE CAUSE OF A FAILURE TO ACCOMMODATE IS IRRELEVANT.

The Ninth Circuit held that the admission of Dr. Lipian's improper testimony was harmless because "[t]he evidence of the University's efforts to meet Simonelli's requests for accommodation was largely undisputed." By this decision, the Ninth Circuit has created a new defense of "efforts to accommodate" that makes the University's accommodation obligations depend on its efforts to provide an agreed-upon accommodation, not its success in doing so.

Liability under the ADA does not turn on an assessment of the University's *efforts* to accommodate. The laws prohibiting disability discrimination were intended to provide an objective standard based on the discriminatory effect of a failure to accommodate

disabled persons. In Alexander v. Choate, 460 U.S. 287, 295-297 (1985), this Court stated:

> Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect. * * *[M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. * * * These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.

The ADA regulations require the University to provide auxiliary aids to disabled students. 28 C.F.R. § 35.160(b)(1). The standard under the regulations is an objective standard: Are the auxiliary aids necessary to ensure an equal educational opportunity (*ibid.*):

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

Where auxiliary aids are not provided, the ADA imposes strict liability. In Bennett-Nelson v. Louisiana Board of Regents, 431 F.3d 448, 454-455 (5th Cir. 2005), the Fifth Circuit property stated the governing standards: "[B]oth the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to

make reasonable accommodations for disabled individuals. Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant."

To be sure, this duty is not unlimited. While the cause of a failure to accommodate is not a defense, undue burden is. As the Fifth Circuit stated in Bennett-Nelson v. Louisiana Board of Regents, supra, 431 F.3d at 455 fn. 12: "In lieu of such an inquiry [as to the cause of the failure to accommodate], the court must determine whether the requested accommodation was 'reasonable'—that is, whether it would impose 'undue financial or administrative burdens' or would require a 'fundamental alteration in the nature of the program'." The ADA regulations incorporate this defense and specifically excuse the University from providing auxiliary aids if doing so "would result * * * in undue financial and administrative burdens." 28 C.F.R. § 35.164.[7]

This structure does not excuse a proven failure to accommodate merely because the entity made efforts to accommodate. A standard based on efforts frustrates the objective standard in 28 C.F.R. § 35.160(b)(1) that public entities "shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." A standard based on efforts undermines the requirements of the undue-burden

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[7] In this case, the University stipulated that large print was not an undue financial or administrative burden. IV ER 803:11-14; II ER 97-98.

defense established in the regulations, including the requirement that the public entity bear the burden of establishing an undue burden, that the decision on undue burden be made at the highest administrative levels, that the decision be accompanied by a written statement explaining the decision and that an alternative accommodation be provided. In practical effect, a standard based on efforts—even reasonable or good faith efforts—interjects the very issues of discriminatory motivation or intent that Congress did not intend to be used to circumscribe liability under the ADA. Alexander v. Choate, supra, 460 U.S. at 295-297.

II. ON THE SECOND QUESTION PRESENTED, THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE ADA'S INTERACTIVE PROCESS AND THE REGULATION THAT THE ACCOMMODATION REQUESTED BY THE DISABLED INDIVIDUAL MUST BE GIVEN PRIMARY CONSIDERATION BECAUSE IT ALLOWS THE UNIVERSITY TO AVOID LIABILITY FOR NOT PROVIDING THE AGREED-UPON ACCOMMODATION BY CLAIMING THAT OTHER ACCOMMODATIONS MIGHT HAVE BEEN POSSIBLE.

The Ninth Circuit concluded that the admission of alternative accommodations was not error because (App. page 3a): "Contrary to Simonelli's belief, the University's agreement to provide him with large print materials was not an admission that his requested accommodation was the only reasonable one."

The Ninth Circuit's decision undermines the interactive accommodation process that is at the heart of the ADA. The interactive process is designed to determine what accommodation is appropriate. Duvall v. County of Kinsap, 260 F.3d 1124, 1139 (9th Cir. 2001). In this interactive process, the entity "is required to

undertake a fact-specific investigation to determine what constitutes a reasonable accommodation." Id. at 1139. The ADA regulations mandate that the public entity "shall give primary consideration to the requests of the individual with disabilities" in determining what kind of auxiliary aide or service is necessary. 28 C.F.R. § 35.160(b)(2). Like other accommodation duties, this obligation is qualified by the regulations providing that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164.

The University agreed to large print as Petitioner's accommodation. The University did not provide that accommodation on time until Petitioner brought this action.

Arguing at trial that alternatives to large print might exist as a defense to the failure to provide the agreed-upon accommodation undermines the interactive process under the ADA, undermines the regulatory requirement that the University must "give primary consideration to the requests of the individual with disabilities" in determining what kind of auxiliary aide or service is necessary (28 C.F.R. § 35.160(b)(2)) and undermines the specific requirements of the undue burden defense under 28 C.F.R. § 35.164.

While the ADA does not prevent a public entity from changing a previously agreed-upon accommodation, any such change would involve a new interactive process. This new interactive process would be subject again to the requirements to give primary consideration to the disabled individual's

requests (28 C.F.R. § 35.160(b)(2)) and the regulatory requirements for showing undue burden under 28 C.F.R. § 35.164. It is only through that new interactive process that the reasonableness of any new or changed accommodation can be finally determined.

The Ninth Circuit's decision allows the University to by-pass the interactive process for changing accommodations. This ruling takes away the University's incentive to honor the interactive process, to comply with the agreed-upon accommodations reached during that process and to undertake a new interactive process if it wants to change an accommodation.

The resulting burden on the rights of disabled individuals is substantial. They will have no assurance that the accommodation determined through the interactive process will be provided. They will lack an effective means to enforce the agreement to provide a particular accommodation. Any effort to hold the University to its promises can be met with the argument that some other accommodation might have been possible. The disabled individual will be compelled to prove at trial that the alternative accommodations asserted by the University in defense are inadequate. This effectively reverses the normal burdens of proof. US Airways, Inc. v. Barnett, 535 U.S. 391, 401-402 (2002).[8] Since these alternatives were

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[8] In *Barnett*, this court stated (at pages 410-402):

> Many of the lower courts, while rejecting both U.S. Airways' and Barnett's more absolute views, have reconciled the phrases "reasonable accommodation" and "undue hardship" in a practical way [¶] They have held that a

never used, their effectiveness for the particular student would never have been tested. The case would inevitably turn into a battle of experts as to the hypothetical effectiveness of proposed accommodations. Stern v. University of Osteopathic Medicine and Health Sciences, 220 F.3d 906, 909 (8th Cir. 2000) ("[E]xpert opinion is necessary here because neither the average layperson or this court can determine without expert assistance the nature of [the disability] and what measures would actually address [the disabled person's] needs."). The ensuing expenditure of costs and time litigating the usefulness of hypothetical

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plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an "accommodation" seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. See, *e.g.*, *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (C.A.1 2001) (plaintiff meets burden on reasonableness by showing that, "at least on the face of things," the accommodation will be feasible for the employer), *Borkowski v. Valley Central School Dist.*, 63 F.3d 131, 138 (C.A.2 1995) (plaintiff satisfies "burden of production" by showing "plausible accommodation"); *Barth v. Gelb*, 2 F.3d 1180, 1187 (C.A.D.C.1993) (interpreting parallel language in Rehabilitation Act, stating that plaintiff need only show he seeks a "*method of accommodation* that is reasonable in the run of cases" (emphasis in original)). [¶] Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances. See *Reed*, *supra*, at 258 (" 'undue hardship inquiry focuses on the hardships imposed ... in the context of the particular [employer's] operations' ") (quoting *Barth*, *supra*, at 1187); *Borkowski*, *supra*, at 138 (after plaintiff makes initial showing, burden falls on employer to show that particular accommodation "would cause it to suffer an undue hardship"); *Barth*, *supra*, at 1187 ("undue hardship inquiry focuses on the hardships imposed in the context of the particular agency's operations")

alternatives does nothing to advance the interests of disabled individuals or to ensure that they receive the accommodations they need and Congress intended they receive.

The Ninth Circuit's decision also undermines the internal dispute resolution process mandated by the ADA Regulations. The regulations require the adoption of "grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part." 28 C.F.R. § 35.107(b). Petitioner invoked this process and the result was a decision to provide him the large print materials he had requested. To allow the University to avoid the outcome of this grievance process by raising the existence of other alternatives at trial, makes the grievance process worthless as a means "for prompt and equitable resolution" of accommodation disputes.

III. ON THE THIRD QUESTION PRESENTED, THE NINTH CIRCUIT'S DECISION UNDERMINES THE ENFORCEMENT OF THE ADA BY DISALLOWING ATTORNEY FEES FOR A PARTIAL SETTLEMENT ENTERED INTO ON THE COURT RECORD AS A RESULT OF SETTLEMENT DISCUSSIONS SUPERVISED BY THE COURT.

The ADA provides for attorney fees to the "prevailing party". 42 U.S.C. § 12205. This "requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." Hewitt v. Helms, 482 U.S. 755, 760 (1987), quoted in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res. 532 U.S. 598, 603-604 (2001)). Additionally, these benefits must arise from a "material alteration of the legal relationship of the parties" (Buckhannon, supra, at 604) accompanied with some

"judicial *imprimatur* on the change" typically involving some judicial supervision over the settlement (id. at 604-605).

In this case, the University's failure to provide Petitioner timely large-print materials continued even after Compliance Officer Newmeyer's decision in Spring 2002 that these materials would be provided. III ER 570-571, 572-573, 574-575, 586:21-587:2, 492:3-7. It was this continued failure to accommodate as agreed that prompted this lawsuit and resulted in a partial settlement that provided Petitioner the large print materials he needed III ER 576:4-17, 585:2-23, 579-580, 583, 379:10-15, 387:7-25.

This partial settlement occurred on the record before the Magistrate Judge during judicially-supervised settlement discussions from August 2002 through June 2003. The settlement was placed on the court's record. In August 2002, Petitioner agreed to a timetable to complete his outstanding examinations and courses and in exchange the University would provide large print materials. App. pages 37a-44a. The clear-cut *quid pro quo* was expressly stated. After describing Petitioner's commitments to complete his examinations and classes, the transcript states (App. page 39a):

> The parties have agreed to this to assess whether or not it is feasible for Mr. Simonelli to proceed with his law school education in this case. And in exchange, the University, without waiving any rights or defenses available to it, will provide to Mr. Simonelli for those three exams and for the two courses, all of the compulsory reading

material in 32 Point Type, separately paginated, spiral bound, in a timely manner.

It was because of this settlement that Petitioner began receiving his materials on time. This accommodation continued until Petitioner graduated.

While no formal consent decree was entered, the Magistrate Judge issued orders[9] that demonstrate continued judicial approval and oversight over the settlement, in the same way that a court would supervise a traditional consent decree that reflected its continued judicial supervision over the settlement, in the same way that a court would supervise a traditional consent decree. App. pages 45a-46a; IV ER 817, 816: ¶ 2. See Buckhannon, supra, 532 U.S. at 604.

The Ninth Circuit's demand for something still more in the way of judicial involvement undermines the attorney fee provisions in the ADA. As in this case, while Petitioner had to expend attorney resources to obtain the necessary accommodation from the court-supervised partial settlement, he is denied the benefits of the attorney fee provisions enacted by Congress to ensure that disabled individuals could litigate to enforce their rights.

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[9] For example, in a March 19, 2003 order, the Court directed Petitioner to take his Creditors' Rights textbook to Copy Central to be enlarged and scanned "to bring it up to 32 point font." IV ER 817. In a June 2, 2003 order, the Magistrate Judge directed Petitioner to advise the Court if he had not received the materials for his Securities Regulation I or Legal Professions courses. IV ER 816. See App. Pages 45a-46a.

Disability accommodations, particularly in the educational context, cannot always wait for the years necessary to litigate cases to a judicial decision on the merits. Disabled students need accommodations immediately if their education is to continue. Interim settlements—particularly court supervised settlements—are a necessity if the ADA is to achieve its goal of assuring equal educational opportunities for disabled students. Denying attorney fees for the benefits interim settlement achieve will only frustrate achievement of the ADA's goals .by discouraging attorneys from handling ADA cases because of the uncertainty of receiving attorney fee awards for successful settlement outcomes.

The "catalyst" situation in Buckhannon, supra, involved purely voluntary actions, separated from any judicial involvement or any legal change in relationship. Id. at 604-605. The reasoning of Buckhannon cannot be extended to judicially-supervised settlements that involve continued judicial involvement in implementing the settlement's terms, even if not formally embodied in a consent decree. Judicially-supervised settlements contain both of the elements that Buckhannon found lacking in "catalyst" cases: Namely, a legally-enforceable change and judicial *imprimatur* of that change evidenced by judicial supervision over the settlement.

CONCLUSION

For the foregoing reasons, Petitioner submits that a Writ of Certiorari should issue.

Respectfully submitted,

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No. 08-15577
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO C. SIMONELLI, Plaintiff - Appellant,
v.
THE UNIVERSITY OF CALIFORNIA AT BERKELEY; et al., Defendants - Appellees.

July 15, 2009, Argued and Submitted, San Francisco, California

July 21, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Northern District of California. D.C. No. 02-CV-01107-JL. James Larson, Magistrate Judge, Presiding.

COUNSEL: For ANTONIO C. SIMONELLI, Plaintiff - Appellant: Christopher W. Katzenbach, Attorney, Kimberly A. Hancock, Esquire, Attorney, KATZENBACH & KHTIKIAN, San Francisco, CA.

For THE UNIVERSITY OF CALIFORNIA AT BERKELEY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE SCHOOL OF LAW (BOALT HALL), JOHN P. DWYER, Dean of the School of Law, VICTORIA ORTIZ, Dean of Students of the School of Law, Defendant - Appellees: Michael D. Bruno, Esquire, Attorney, Don Willenburg,

Esquire, Attorney, Marcie Isom, Esquire, GORDON & REES, LLP, San Francisco, CA.

JUDGES: Before: SILVERMAN, CLIFTON and M. SMITH, Circuit Judges.

OPINION

MEMORANDUM *

Before: SILVERMAN, CLIFTON and M. SMITH, Circuit Judges.

After a trial on Antonio Simonelli's disability discrimination claims, the jury rendered a verdict in favor of defendants University of California at Berkeley, its law school, and several of its employees (collectively, "the University"). Now, Simonelli appeals the district court's orders denying his motion for new trial and his motion for partial attorney fees. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

First, to whatever extent a psychiatrist may testify that someone claiming mental illness is malingering, Lipian's testimony clearly crossed the line into an inadmissible general opinion of Simonelli's character as a human being. *See, e.g., United States v. Sine*, 493 F.3d 1021, 1040 (9th Cir. 2007) ("The jury has the ultimate task of making credibility determinations about individual witnesses . . . ."). The district court abused its discretion in allowing Lipian to testify, for example, that Simonelli was motivated by secondary gain, that he has a long history (prior to the events of this case) of "gaming the system," and that he is a "my way or the highway kind of guy." These and other examples go

way beyond a permissible professional opinion that a person does not suffer from mental illness and is feigning psychiatric symptoms.

Nevertheless, the error was harmless. It was for the jury to decide whether the University excluded Simonelli from its services or otherwise discriminated against him. Lipian's testimony primarily pertained to the damages portion of the case -- whether Simonelli suffered mental distress as a result of the University's allegedly wrongful conduct. To the extent that Lipian's testimony might have affected the jury's evaluation as to liability, the remaining evidence, disregarding Lipian's testimony, still overwhelmingly favored the University's position. The evidence of the University's efforts to meet Simonelli's requests for accommodation was largely undisputed. Simonelli failed to establish that he was prejudiced by the testimony by Lipian that should not have been admitted.

Second, the district court did not abuse its discretion by admitting evidence that the University proposed alternative accommodations. Contrary to Simonelli's belief, the University's agreement to provide him with large print materials was not an admission that his requested accommodation was the only reasonable one.

Finally, the district court did not abuse its discretion by denying Simonelli attorney's fees. Simonelli failed to demonstrate that the partial settlement agreement between the parties materially altered their relationship or that it bore the necessary judicial imprimatur. *See* *Carbonell v. INS*, 429 F.3d 894, 898 (9th Cir. 2005).

AFFIRMED.

No. C 02-1107 JL
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO C. SIMONELLI,
Plaintiff,
v.
UNIVERSITY OF CALIFORNIA - BERKELEY, ET AL.,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL (Docket # 254) and MOTION FOR ATTORNEY FEES (Docket # 251)

Introduction

Plaintiff Antonio C. Simonelli's motions for a new trial and for attorney's fees came on for hearing. Chrstopher H. Katzenbach, KATZENBACH & KHTIKIAN, appeared for Plaintiff. Michael Bruno, GORDON & REES, appeared for Defendant. The Court considered the moving and opposing papers and the arguments of counsel and hereby denies both motions.

Factual Background

Plaintiff Antonio Simonelli has been diag osed with cerebral palsy, a result of his premature birth. His most significant physical problem is very low vision. Specifically, he has severe strabismus or nearsightedness, only partly correctable with contact lenses, and nystagmus, a tendency of his eyes to stray out of alignment, affecting their ability to focus, and his

ability to read. He is intelligent and ambitious, and graduated with honors from the University of California Berkeley, and in the upper third of his class at UC Berkeley's Boalt Hall School of Law. He commenced law school at Boalt in Fall 2000 and graduated in May 2005.

He is and was while a student at Boalt a person with a disability within the meaning of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 705(20)) and the Americans with Disabilities Act (42 U.S.C. § 12102(2)). He is and was also a handicapped person within the meaning of the Federal Regulations issued under the Rehabilitation Act at 34 C.F.R. and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 705(2)), 794). All parties agree that Simonelli is and was while a student at Boalt a qualified individual with a disability within the meaning of section 101(8) of the Americans with Disabilities Act (42 U.S.C. § 12111(8)) and a qualified handicapped person within the meaning of the Federal Regulations issued under the Rehabilitation Act at 34 C.F.R. Part 104.

Defendant the University of California Berkeley ("UC") is and has been continuously since at least August 2000 a recipient of Federal financial assistance within the meaning of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), as well as a public entity within the meaning of section 201(1) of the Americans with Disabilities Act (42 U.S.C. §12131 (1)), and is subject to the federal regulations issued by the Department of Education set forth in 34 C.F.R. Part 104 and by the Department of Justice set forth in 28 C.F.R. Part 35.

Simonelli obtained his Bachelor of Arts degree from UC in May 2000. Before Simonelli's law school classes began, he requested accommodations from Boalt. Ward Newmeyer, ADA Compliance Officer for the University, conducted an investigation to determine the proper accommodation for Simonelli.

On March 24, 2004 Simonelli was injured in an automobile accident and was unable to attend the remainder of his classes for the Spring 2004 semester. Simonelli took his Spring 2004 exams after the original exam date because of those injuries. He took his final examinations after the original exam dates in every semester until Spring 2003.

Both sides agree that Simonelli received all of his course materials on time and in the correct format from the spring 2003 semester on. (Joint Statement of Undisputed Material Facts, filed by Antonio Simonelli on August 31, 2007, modified September 4, 2007; Docket #159)

Procedural Background

This Court has original jurisdiction pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and the Americans With Disabilities Act of 1990 ("ADA") (42 U.S.C. § 12101 et seq.), and supplemental jurisdiction over claims for violation of the Unruh Civil Rights Act (California Civil Code §§ 51, 52), (b).

Simonelli filed his complaint in March 2002 while a student at Boalt Hall School of Law of the University of California at Berkeley. Two months later he filed an application for a temporary restraining order ("TRO")

and for a preliminary injunction. The district court (Hon. Charles R. Breyer) referred the parties for a settlement conference before a magistrate judge (Hon. Maria-Elena James). They were not able to resolve their dispute. Simonelli renewed his motion for a TRO. The district court denied the motion and referred the parties back to the magistrate judge for a further settlement conference.

The parties continued settlement negotiations. By May 2003 they had reached an interim agreement. The magistrate judge issued a series of orders to both sides regarding compliance with the interim agreement.

In August 2003 Simonelli filed an application for a new TRO to permit him to participate for a second time in the interview process for summer law firm employment. Judge Breyer denied the application.

On August 24, 2004, Simonelli advised Judge Breyer that:

> "Magistrate Judge James has conducted settlement conferences with the parties. As a result of these conferences, the parties have reached a settlement as to accommodation of plaintiff's disability and a schedule for plaintiff to complete his law school studies. The parties will be conducting a further settlement conference with Judge James in October or November to resolve issues of damages and attorney fees."

The parties participated in a number of case management conferences and settlement conferences but advised the court over a year later on October 3,

2005 that they were unable to settle and the case should be set for trial or dispositive motions.

In January 2006 all parties consented to reassignment to this Court for all further proceedings. The case was scheduled for case management conference in May 2006. The parties stipulated to continue the case management conference to October and the discovery cut-off to the end of December 2006.

The parties submitted to the Court several status reports regarding discovery issues, but were able to resolve them without intervention. They agreed that they could not complete discovery by the end of December 2006. The Court extended the discovery cut-off to May 31, 2007. In December, the Court set a further case management conference for April 2007 and ordered the parties to file any cross-motions for summary judgment by July 31, 2007.

In March 2007 Gordon and Rees substituted as counsel for Lafayette and Kumagai for all Defendants. At the case management conference in April 2007 the Court set a trial date of November 5, 2007 and ordered Simonelli to file a motion for summary judgment by August 31. The discovery cut-off was extended to July 27. The parties had a number of discovery disputes over the course of the summer, which the Court resolved.

In August the parties stipulated to the dismissal without prejudice of Plaintiff's First Claim for Relief for failure to accommodate Plaintiff's disability and Plaintiff's Third Claim for Relief for discrimination pursuant to 42 U.S.C. §1983 against Defendants Dwyer, Newmeyer and Ortiz. A settlement conference was held

on September 10, 2007, but terminated after thirty minutes.

The Court set dates for jury trial and for a pretrial conference at which motions would be heard.

The parties filed dozens of pre-trial motions. They objected to each others' proposed discovery excerpts, exhibits, witnesses, jury instructions and voir dire. The Court ruled on most of these motions at the pretrial conference October 24, 2007. Only a few rulings are relevant to Simonelli's motion for new trial:

The Court denied without prejudice Defendants' motion to exclude references to prior settlement agreements, but with the limitation that neither party was to refer to the process as a "settlement" or "settlement conference" or the agreement as a "settlement agreement." The Court ruled that the evidence was admissible to outline the chronology of the case, but would not be allowed on the issue of liability. The Court left the subject open to a possible limiting instruction at the end of the case, as needed.

The Court denied Simonelli's motion to exclude evidence of alternative accommodations offered to Simonelli in law school and of Simonelli's undergraduate accommodations.

The Court denied without prejudice Simonelli's motion to exclude the expert testimony of Dr. Lipian, but warned that Dr. Lipian was strictly limited to testifying about malingering as within his expertise in reference to the DSM-IV. Dr. Lipian was not to testify as to the general truthfulness or credibility of Plaintiff.

The Court overruled without prejudice Simonelli's objection to any testimony by witness Angelika Leventhal.

Simonelli had meanwhile filed a motion for partial summary judgment, based on three propositions: that the University violated its duty to accommodate him; that the University's actions constituted "deliberate indifference" to his federally protected rights; and that he was entitled to compensation for lost salary because the University's failure to accommodate him delayed his graduation and prevented him from obtaining employment as a lawyer.

The Court denied Plaintiff's motion for partial summary judgment on November 1, 2007. The Court held that Simonelli had failed to meet his burden to show that there was no genuine issue of material fact that the University violated its duty to accommodate him, that the University's actions constituted "deliberate indifference" to his federally protected rights, and that he is entitled to lost salary due to the University's failure to accommodate him and the consequent delay of his graduation preventing him from obtaining employment as a lawyer. The case went to jury trial November 5.

After the close of evidence, the Court dismissed the individual defendants, Deans John Dwyer and Victoria Ortiz, in response to Defendants' Motion for Judgment as a Matter of Law. After viewing all the evidence in the light most favorable to Simonelli, the Court was compelled to find that he had failed to establish a prima facie case that either Dwyer or Ortiz intentionally or unintentionally discriminated against him on the basis

of his disability in violation of the California Unruh Civil Rights Act, Cal. Civ. Code §51 et seq. (Order at Docket # 243)

After closing arguments and jury instructions, and two hours of deliberations, the jury returned a special verdict for the University. On the four-page, nine-question Verdict Form, the jury answered only Question 1:

> "1. Do you find that the University excluded Mr. Simonelli from participating in, or denied him the benefits of, the University's services, programs, or activities or the University otherwise discriminated against him?
>
> _____YES __X__ NO "

(Verdict Form at Docket # 246)

The Court polled the jury, at the request of counsel for both sides, and then discharged them. All counsel had the opportunity to talk to members of the jury after the verdict.

On November 16, judgment was entered in favor of The Regents of the University of California, The School of Law (Boalt Hall), and The University of California at Berkeley against Antonio C. Simonelli.

MOTION FOR NEW TRIAL

Simonelli moves for a new trial on the grounds that:

1. The jury's verdict was against the clear weight

of the evidence;

2. The admission of evidence as to allegedly alternative accommodations was erroneous and prejudicial and harmful to Simonelli;

3. The testimony of Mark Lipian was erroneously admitted and prejudicial and armful to Simonelli;

4. The testimony of Angelika Leventhal was erroneously admitted as it could only be considered as expert testimony for which no proper pretrial disclosure was made;

5. The exclusion of evidence of partial interim settlements prevented Simonelli from presenting a complete picture of the case: the University was not merely a "bumbling bureaucracy," but a recalcitrant institution, unwilling to honor its promises unless forced to; and

6. The testimony of Mark Lipian should have been stricken for violating the Court's sequestration order.

Motion for New Trial - Standard

Rule 59(a) states, "A new trial may be granted ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed.R.Civ.P. 59(a)(1).FN4 As this circuit has noted, " Rule 59 does not specify the grounds on which a motion for a new trial may be granted." Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1035 (9th Cir.2003).

Rather, the court is "bound by those grounds that have been historically recognized." Id. Historically recognized grounds include, but are not limited to, claims "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). The Ninth Circuit has held that "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 510 n. 15 (9th Cir.2000). Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir.2007)

Upon the Rule 59 motion of the party against whom a verdict has been returned, the district court has "the duty ... to weigh the evidence as [the court] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence." Murphy v. City of Long Beach, 914 F.2d 183, 187 (9th Cir.1990) (quoting Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246, 256 (9th Cir.1957)). (cited in Molski, 481 F.3d at 729.)

An appellate court generally will not reverse the denial of a new trial motion if there was some "reasonable basis" for the jury's verdict. If there is no reasonable basis, however, "the absolute absence of evidence to support the jury's verdict makes [refusal to grant a new trial] an error in law." Molski, 481 F.3d at 729 (internal citations omitted).

To prevail on a Title III discrimination claim, the plaintiff must show that (1) he is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability. 42 U.S.C. §§ 12182(a)-(b).

The weight of the evidence supports the jury's verdict

The Court may grant a new trial only if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." Silver Sage Partners, Ltd. V. City of Desert Hot Springs, 251 F.3d 814, 819 (9th Cir. 2001) (emphasis added). The Court may not grant a new trial merely because the trial court would have arrived at a different verdict. Wallace v. City of San Diego, 479 F.3d 616, 630 (9th Cir. 2007), but only if, after giving full respect to the jury's findings, the judge "is left with the definite and firm conviction that a mistake has been committed by the jury." Landes Const. Co., Inc. V. Royal Bank of Canada, 833 F.2d 1365, 1371-72 (9th Cir. 1987).

The clear weight of the evidence at the trial of this case supports the jury's verdict that the University did not discriminate against Simonelli by excluding him from participating in the University's programs. To the contrary, the evidence showed that the University bent over backward for Simonelli: Holly Parrish worked hard to accommodate him; Professor Berring, John Steele, and Amy Guzman attempted to assist him in various ways with his accommodations and demands.

The University provided Simonelli with training in electronic technology, allowed him to take his exams at home with triple time and one week between exams, hired professional note takers, allowed him to take a reduced course load, offered him books on tape and four-track tape machines, offered him electronic adaptive technology, provided him books on disk, offered him use of Closed Circuit Television, and paid for professional readers.

The Disabled Student Program ("DSP") worked hard to encourage Simonelli to be independent and to succeed both during and after law school, even creating a "mini production facility" to facilitate copying Simonelli's course materials. The DSP worked with the law school, with Boalt Hall Copy Center, and with Copy Central to address Simonelli's requests. The personnel from the DSP, many of whom were disabled themselves, were personally and professionally committed to doing everything possible to assist a disabled student, which they did for Simonelli. The University spent approximately $160,000 providing Simonelli with enlarged text reading materials for his law school classes. DSP has never before or since, spent this much money (or time, probably) on one student.

At trial Simonelli presented evidence of alleged delays which turned out not to be what he represented. For example, he claimed that the University delayed for months providing him with enlarged text materials for his Legal Professions class. However, Holly Parrish testified that she produced the materials on time, but that Simonelli complained they were not to his exact specifications.

The evidence was overwhelming that the University offered Simonelli reasonable accommodations, tailored to his individual needs, to enable him to participate fully in his law school classes.

Evidence of alternative accommodations was admissible

Defendants distinguish the cases Simonelli cites against admission of evidence of alternative accommodations. Simonelli relies on Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), in which an employer claimed it was not possible to accommodate an employee, not the case here; and Borkowski v. Valley Central School, Dist., 63 F.3d 131 (2d Cir. 1995), where the defendant claimed an undue hardship defense, which the Defendants in this case expressly disavowed.

The controlling case is Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001), cited both by Defendants and Simonelli. In that case the court held that a public entity "acts" when it investigates reasonable accommodations and offers them based on that investigation and not on stereotyped assumptions of what disabled students need. This is what happened here. Simonelli had successfully used certain accommodations as an undergraduate at UC Berkeley. Based on this specific information about Simonelli himself, and on DSP's expertise in providing such accommodations for about 10,000 students over the course of 25 years, Defendants offered those same previously successful accommodations, as well as others. The only question for the jury to answer, if it got that far, was whether the University's acts were so unfair as to constitute "deliberate indifference" or some

other type of intentional discrimination. Excluding this information would have been unfair and contrary to law. The Court correctly declined to exclude evidence of alternative accommodations.

Testimony of Angelika Leventhal as a percipient witness is admissible

Simonelli objected to Angelika Leventhal as an undisclosed expert. She evaluated Simonelli on behalf of the California Department of Rehabilitation to discern what accommodations would be best for him. A lay witness, like Leventhal, is generally precluded from expressing an opinion on matters that are beyond the realm of common experience and which require the special skill and knowledge of an expert witness.

However, when such testimony is based on personal knowledge and susceptible to cross-examination, it is admissible.

Leventhal testified as a percipient witness, to matters within her personal knowledge. The Department of Rehabilitation hired her to perform an adaptive technology evaluation of Simonelli and she testified only about the tests she performed and the conclusions she reached at the time she administered the tests. She did not testify as to her opinion based on a hypothetical situation, but that, in effect, "I administered those tests and concluded that those accommodations worked."

Simonelli complained of not being able to depose Leventhal. In fact, Defendants had disclosed Leventhal as a witness nearly six months before trial but Simonelli made no effort to depose her or acquire any

additional information about her until the week before trial.

Defendants provided Simonelli's counsel with her contact information upon request, but Simonelli's attorney's office had already contacted her prior to receiving that information from Defendants.

The Court properly admitted Angelika Leventhal's testimony.

Dr. Mark Lipian's testimony on malingering was admissible

Based on an eight-hour examination of Simonelli and review of 48 categories of documents, Dr. Lipian, a forensic psychiatrist, rendered two opinions:

> 1. Simonelli did not suffer any clinically significant emotional distress from anything Defendants did or did not do; and
> 2 The emotional distress, if any, that Simonelli suffered from his injuries in the car accident, is being misattributed to his experience at Boalt in such a way that it implicates the DSM-IV's definition of "malingering."

Defendants distinguish the Nichols decision, on which Simonelli relies. In that case, the defendant's expert testified that the plaintiff "had poor psychiatric credibility." The court held this was not a proper subject for an expert because the expert offered a psychological label for what was in fact her evaluation of the truth of the plaintiff's statements. Nichols v. American Nat'l. Ins. Co., 154 F.3d 875, 884-885 (8th Cir.

1998).

In this case, Dr. Lipian testified not on Simonelli's credibility, but on Simonelli's claim that he suffered clinically significant emotional distress from his law school experience. Dr. Lipian testified that this is psychiatrically improbable or impossible. Courts routinely admit testimony on malingering. U.S. v. O'Kennard, 201 Fed. Appx. 369, 370 (7th Cir. 2006); Strickland v. U.S., 316 F.2d 656 (D.C. Cir. 1963); James v. Tighlman, 194 F.R.D. 408 (D.Conn.1999). Dr. Lipian has testified as an expert on the subject of malingering in approximately 10 trials and his testimony has never been limited or excluded. (Lipian Decl., Ex. 1 to Def. Opp. to Mot. for New Trial).

The Court properly admitted Dr. Lipian's testimony.

Dr. Lipian's review of portions of trial transcript was not grounds to strike his Testimony

Simonelli moved to strike Dr. Lipian's trial testimony on the grounds that he violated the Court's order sequestering witnesses. Dr. Lipian testified that he reviewed a partial transcript of the testimony of Simonelli and of Simonelli's treating psychiatrist and testifying expert, Dr. Lenore Terr. There was no express exception to the sequestration order for expert witnesses. Defendants contend that there was also no explicit order that prohibited an expert witness from reviewing any of the trial transcript. Dr. Lipian read three pages of one daily transcript of Simonelli's and Dr. Terr's testimony.

The purpose of the sequestration rule is to prevent the

shaping of the testimony of one witness to match that of another, and to discourage fabrication and collusion. Taylor v. U.S., 388 F.2d 786 (9th Cir. 1967). Dr. Lipian reviewed testimony by Simonelli about statements he had already made to Dr. Lipian regarding having pain at night and about what he did or did not report to Dr. Terr. (Ex. 3 to Def. Opp. to Mot. For New Trial) Furthermore, Simonelli fails to show how he was prejudiced by Dr. Lipian's review of this testimony. U.S. v Lamp, 779 F.2d 1088, 1086 (5th Cir. 1986) (no merit to contention that witness's testimony should be excluded due to violation of sequestration order, without showing of prejudice.)

The Ninth Circuit reviews a decision whether to permit a witness to testify after an alleged violation of a sequestration order, for abuse of discretion, looking to the nature and effect of the violation. Disqualification is "strongly disfavored." U.S. v. English, 92 F.3d 909, 913 (9th Cir.1996). This Court must also consider whether the alleged violation of the sequestration order by Defendants was intentional and whether there was prejudice to the objecting party. Id.

Simonelli fails to present any evidence that Dr. Lipian deliberately violated the Court's order, altered his testimony as a result of reading the transcripts, or that his having read the transcripts prejudiced Simonelli.

Experts are generally permitted to consider trial testimony in rendering their opinions. Dr. Lipian was subject to unrestricted cross examination. Had defense counsel sought on exception to the exclusionary order for Dr. Lipian, the Court would have granted it.

This Court properly declined to strike Dr. Lipian's testimony.

The Court properly excluded evidence of partial settlements

Evidence of an offer or acceptance of an offer to compromise a disputed claim is not admissible to provide liability for or invalidity of a claim or its amount. FRE 408(a). Nor is evidence of conduct or statements made in the course of compromise negotiations admissible. FRE 408(a)(2). This is to encourage the free discussion of possible resolutions of a dispute without litigation. Parties frequently offer to settle, even where they deny liability, as here.

In fact, this court's ADR Local Rules codify the policy of maintaining confidentiality of settlement discussions. ADR Local Rule 7-5 provides that the court, the settlement judge, all counsel and all parties shall maintain the confidentiality of written settlement conference statements and anything said or that happens in connection with a settlement conference. Further, this information may not be used "for any purpose , including impeachment, in any pending or future proceeding in this court." ADR Local Rule 7-4.

Simonelli objects to the Court's excluding evidence of the partial settlements in this case. He concedes that Federal Rule of Evidence 408 limits the prohibition on using settlements to prove liability but notes that it also permits evidence of settlement agreements for other purposes. Brocklesby v. United States, 767 F.2d 1288, 1292-93 (9th Cir. 1985). In fact, FRE 408 expressly provides for the following exception: "This rule ...does

not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness...." Id. at 1292.

Courts have admitted evidence of offers or agreements to compromise for purposes of rebuttal, for purposes of impeachment, to show the defendant's knowledge and intent, to show a continuing course of reckless conduct, to negate the defense of mistake, and to prove estoppel. Bankcard America, Inc. v. Universal Bancard Systems, Inc., 203 F.3d 477, 484 (7th Cir. 2000) (holding that use of FRE 408 to block evidence that the violation of the contract was invited would be unfair, and outweighed the potential for discouraging future settlements.) Id.

Simonelli contends that Federal Rule of Evidence 83, that local rules must be consistent with the Federal Rules, trumps the University's reliance on this Court's Alternative Dispute Resolution Local Rule 7-5.

Simonelli proffered the University's agreement to employ Copy Central to do the copying as a result of settlement negotiations, not to establish liability, but to show why the University began to use Copy Central. He contends that the University was able to benefit unfairly by presenting this as evidence of its bending over backward to accommodate Simonelli. However, he contends, if the evidence had been presented in context, the jury would have understood that the University only went to Copy Central after the pressure of settlement negotiations. Simonelli cites Brady v. Wal-Mart Stores, Inc., 455 F.Supp.2d 157, 179-182 (E.D.N.Y. 2006), where the district court admitted the terms of a consent decree to rebut claims of good-faith and compliance with defendant's ADA obligations—the

very use for which Simonelli contends evidence of the settlements is relevant in this case.

Defendants object to what they contend was Simonelli's attempt to bias the jury against Defendants by leading the jury to infer an admission of liability on their part. Defendants argue that it is not relevant why Defendants started using Copy Central because Simonelli admits there were no delays at that point in his receiving his materials. If Simonelli intended to show that the University's earlier failure to use Copy Central was a "reckless disregard of its accommodation obligations," he could have demonstrated that without reference to the settlement agreements.

Defendants contend that even if there were some probative value to admit references to the parties' settlement negotiations, that would be outweighed by the risks of prejudice and confusion. See FRE 403; Williams v. Chevron USA, 875 F.2d 501, 504 (5th Cir. 1989) (exclusion of evidence offered for impeachment purposes not an abuse of discretion when it was "possible that the jury would have confused its purpose for that precluded by Rule 408").

In the case at bar not only might the jury have inferred liability, but the trial could have been sidetracked into explanations of the three years of settlement negotiations, and debates over what was and was not decided. Simonelli's attorney, Mr. Katzenbach, was present during the negotiations and therefore a witness to the settlements. Admission of the settlements might have led to "a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial." Adv. Comm. Notes to 2006

Amendments to FRE 408 (internal quotes admitted). Admission of evidence of the settlements could have backfired on Simonelli.

This Court concludes that the evidence of the partial settlements in this case was properly excluded, in light of the requirement of confidentiality for settlement discussions, in both the Federal Rules of Evidence and the ADR Local Rules. Whatever probative value such evidence might have had would have been outweighed by potential prejudice to Defendants and possibly even to Simonelli, and would have had a strong likelihood of confusing the jury. Evidence of the settlement discussions would likely have led the jury to conclude that Defendants had admitted liability by agreeing to provide Simonelli with some of his requests - - exactly the result which Rule 408 seeks to prevent.

Conclusion on Motion for New Trial

Accordingly, for all the above reasons, the Court denies Simonelli's motion for a
new trial.

MOTION FOR ATTORNEY'S FEES

Simonelli moves for an award of attorney fees, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure and the Americans with Disabilities Act, 42 U.S.C. §12205 and the Rehabilitation Act of 1973, 29 U.S.C. §794(a)(b). He seeks an award for 163.7 hours by Mr. Katzenbach at $250 per hour and 0.6 hours for Ms. Hancock at $150 per hour, during the period from the beginning of this case until Simonelli's graduation from law school in May 2005, for a total of $40,865. He also

requests $622.40 for expenses incurred during the same period.

Attorney Katzenbach has 30 years' experience in employment and labor law and litigation, in government (Enforcement Division, Appellate Court Branch, NLRB) and private practice. He received his B.A. degree in 1973 from Stanford University and his J.D. in 1976 from Yale Law School. He is the member of numerous state and federal bars, including the Northern District, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court. In his motion Katzenbach describes a number of cases in which he received awards at hourly rates as high as $350 per hour, for trial and appellate work. McBride v. PLM International, C-95-2818 CW (decision on appeal at 179 F.3d 737 (9th Cir. 1999).

Ms. Hancock was admitted to the California bar in 1999. She received her B.A. from UC Berkeley in 1988 and her J.D. from Boalt Hall in 1999. She was an associate at Pillsbury Winthrop, before joining Katzenbach and Khtikian in 2003, and has since specialized in labor and employment litigation.

Simonelli's counsel did not meet and confer

Defendants note that Simonelli did not prevail on summary judgment or at trial; his sole basis for a fee award is the partial settlements the parties arrived at in 2002 and 2004.

Preliminarily, Defendants ask this Court to deny Simonelli's motion, not only because he is not a prevailing party, but also because he failed to meet and

confer, as required by Northern District Local Rule 54-6(a), which provides:

Counsel for the respective parties must meet and confer for the purpose of resolving all disputed issues relating to attorney's fees before making a motion for award of attorney's fees.

If the moving party makes a good faith effort to arrange a conference, but none is held, then counsel must file a declaration certifying counsel's good faith effort and why the conference was not held. (NDLR 54-6(b))

Simonelli's counsel in his declaration in support of his motion for fees offers his excuse for not attempting to arrange a conference: Defendants only offered $10,000 in fees at a settlement conference in September 2007, two months before the start of trial.

Consequently, he "did not seek further discussions in connection with this motion as such discussions post-trial seemed pointless."

Defendants contend fees are unreasonable

Finally, Defendants reject the amount of fees requested as unreasonable - - they contend that Simonelli, even if he could recover, should not be awarded fees for work on unsuccessful motions or on issues not resolved by any settlement, or for time spent after the August 2004 settlement conference. Defendants contend he should receive only $22,328.40, if anything.

Because the Court finds that Simonelli is not a

prevailing party, it does not assess the reasonableness of the fee request. The Court agrees that Simonelli did not make a concerted effort to resolve the fee issue before filing a motion but disregards this requirement in order to decide the question on the merits.

The terms of the agreements

Simonelli alleges that he is a partially prevailing party by reason of the partial settlement agreements the parties recorded before Magistrate Judge Maria-Elena James, which ensured that he would receive timely enlarged print materials for the remainder of his law school studies. Specifically he contends that the settlement agreement entered into by the parties before Judge James ensured that the University, through an arrangement with Copy Central, would provide him with timely enlarged text materials for his law school classes.

There are two agreements - - the first was reached on August 14, 2002 and the second August 5, 2004. The August 14, 2002 agreement is at Exhibit 4 to the Declaration of Marcie Isom in Opposition to Plaintiff's motion for attorney's fees.

Defendants argue that Simonelli has not prevailed on anything in this lawsuit - -Judge Breyer denied his first motion for a temporary restraining order and referred the parties to Magistrate Judge James for a settlement conference. After a series of meetings with Judge James, the parties eventually reached an agreement which Simonelli asserts as the basis for his fee claim. However, Simonelli subsequently refused to sign off on the written version of their agreement and Judge

James stated on the record on August 14, 2002, at the initial conference, that it was "not really a binding agreement." (Exhibit 4 to Isom Declaration).

The parties endorsed what Judge James described as "a tentative agreement at this point," and Mr. Katzenbach referred to it as "an interim solution that will take us through the fall semester of 2002, which will involve Mr. Simonelli taking three exams for courses which he has already taken, but has not taken the final exams." The parties further agreed that Mr. Simonelli would complete the three exams during the fall semester, no later than January 9, 2003 and enroll in two Law School courses during the Fall 2002, and take and complete the final exams for those courses during the fall semester 2002, during final exam week, no later than December 20, 2002. If the University did not require Simonelli to take the two exams during that time, he agreed to waive his rights to a one-week time-off period between exams, a reasonable accommodation which had been offered to him by the University.

The purpose of the agreement, according to Simonelli's counsel, was "to assess whether or not it is feasible for Mr. Simonelli to proceed with his law school education in this case."

The University agreed, "without waiving any rights or defenses available to it, [to] provide to Mr. Simonelli for those three exams and for the two courses, all of the compulsory reading material in 32 point type, separately paginated, spiral bound, in a timely manner."

Defense counsel assented to Simonelli's counsel's

recitation of their agreement. (Id.at 3:14-5:22, 6:20)

It is this agreement which Judge James characterized, "And this isn't really a binding agreement." (Id. at 6:21-22)

The agreement provided that:

- Simonelli would reduce his course load and take make-up examinations for classes he had already taken;

- Simonelli would arrange his schedule to be on track to graduate in Fall 2004;

- The University would continue to provide Simonelli with enlarged-print text for his classes. (Id.)

Magistrate Judge James between December 12, 2002 and July 30, 2003, also issued a series of ancillary orders related to the case but not incorporating the agreement, including, that:

- Simonelli release his medical records to Defendants;
- Simonelli may not tape record the lectures in his Torts class;
- Simonelli may transfer Torts classes, but must be responsible for arranging and paying for the copying and enlargement of materials (he failed to transfer classes);
- Simonelli bring his Creditors' Rights book to Copy Central by a specified date to be enlarged to 32 point font and that color paper should be

used as a divider between sections;
• Defendants give Simonelli notice of the time and place of the independent medical examination;
• Simonelli contact the Court by a specific date to indicate if there are any materials he has not received for Securities Regulations or Legal professions;
• Simonelli submit to a low vision assessment;

(Exhibits 1 and 2 to Katzenbach's Declaration ISO Mot. for Attorney Fees are documents reflecting the orders by Judge James and a transcript of the second on-the-record agreement between the parties, memorialized in a memo from Defendants' former counsel on December 3, 2004.) The proceedings themselves occurred August 5, 2004. It is this agreement which Simonelli refused to sign. It provided that:

• Simonelli would not enroll in the Fall 2004 semester;
• By December 22, 2004, Simonelli would take make-up final examinations in four classes;
• Simonelli would complete the requirements for the JD degree in Spring 2005. If he did not do so, Defendants would not permit him to re-enroll or graduate from Boalt.

All parties agreed to be bound by these terms.

(Ex. 6 to Isom Declaration, letter to Katzenbach from former defense counsel Eric DeWalt)

Simonelli is not a prevailing party

Simonelli argues that as a result of these settlement negotiations he prevailed on a significant issue in litigation which achieved some of the benefits he sought in bringing suit. Park v. Anaheim Union High School Dist., 464 F.3d 1025, 1034 (9th Cir. 2006) (internal citations omitted). He also contends that he achieved a "material alteration of the legal relationship of the parties." Buckhannon Bd. and Care Home, Inc. v. W.Va. Dept. Of Health & Human Res., 532 U.S. 598, 604 (2001). He characterizes the agreement the parties reached after meeting with Judge James as "legally enforceable" and therefore a "judicially sanctioned change in the legal relationship of the parties." Carbonell v. I.N.S., 429 F.3d 894, 901 (9th Cir. 2005).

The court of appeals in that case held that "a plaintiff who succeeds in obtaining a court order incorporating an agreement that includes relief the plaintiff sought in the lawsuit ... is a prevailing party for attorney's fees purposes." Carbonell v. I.N.S. 429 F.3d 894, 901 (9th Cir. 2005) (citing Labotest, Inc. v. Bonta, 297 F.3d 892, at 893 (9th Cir. 2002)).

In the case at bar, Simonelli presumably bootstraps this theory onto orders by Judge James which were related to the case and the parties' negotiations but did not by any stretch of the imagination incorporate the agreement of the parties. Carbonell is completely distinguishable from this case.

At the hearing on the motion, Simonelli's counsel emphasized Simonelli's reliance on a decision which in fact seriously undermines his position - - the P.N. case, in which the court of appeals affirmed the district court's decision that a parent, who settled her claim

against a school district via an agreement signed only by the parties, was not a prevailing party for purposes of an award of attorney fees. The reason was that the agreement lacked a judicial imprimatur, which that court interpreted literally as the judge's signature on the agreement.

"The conflict was resolved by a settlement agreement signed only by the parties. The district court held that P.N. was not a prevailing party, and thus, not entitled to attorneys' fees under the IDEA because the settlement agreement lacked any judicial imprimatur. We affirm."

P.N. v. Seattle School Dist. No. 1, 474 F.3d 1165, 1167 (9th Cir. 2007)(citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 600 (Emphasis added).

In the case at bar, neither the settlement judge, Magistrate Judge James, nor the trial judge at that time, Judge Breyer, signed off on the parties' agreement. In fact, neither did Simonelli. Although this is not the sole indicator that the agreements were insufficient to make Simonelli a prevailing party, the absence of any judge's signature most obviously renders the agreements unenforceable and insufficient to transform Simonelli into a prevailing party, even a partially prevailing party, to justify an award of attorney fees.

Voluntary Acts by Defendants

Procedural neglect aside, Simonelli cannot obtain an award of fees, because a voluntary act by Defendants,

without any change in the legal positions of the parties, and without any judicially enforceable order or other "judicial imprimatur," cannot support an award of fees. No defendant would ever voluntarily make any gesture of good will if that automatically led to a fee penalty afterwards.

The controlling case is Buckhannon Board and Care Home v. West Virginia Dept. Of Health & Human Res., 532 U.S. 598 (2001). The Court held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." Id. at 604.

The Court found there was no justification for an award of fees merely because a defendant agrees to something a plaintiff wanted. "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees without a corresponding alteration in the legal relationship of the parties." Id. at 605 (Emphasis in original).

The majority expressly rejected the dissenter's suggestion that fees be awarded where the plaintiff's claim "was at least colorable" and "not groundless." Rather, the majority reiterated, "We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a frivolous but nonetheless potentially meritless lawsuit . . . has obtained any judicial relief." Id. The Court was

referring to a case which was dismissed as moot due to a change in the law before trial. However, this policy consideration is even stronger in a case such as this one, where Simonelli's lawsuit was rejected on the merits, by the Court on summary judgment, and by the jury, after trial.

In this case there was no judicial imprimatur on the agreements between the parties, by either Judge Breyer, the trial judge at the time they were made, or Magistrate Judge James, the settlement judge. In fact, Simonelli himself failed to sign off on the 2004 agreement.

Conclusion on Motion for Attorney's Fees

For all the above reasons, the Court must deny Simonelli's motion for attorney fees.

IT IS SO ORDERED.
DATED: February 14, 2008

Filed 9/8/2009

No. 08-15577

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO C. SIMONELLI, Plaintiff - Appellant,

v.

THE UNIVERSITY OF CALIFORNIA AT BERKELEY; et al., Defendants - Appellees.

JUDGES: Before: SILVERMAN, CLIFTON and M. SMITH, Circuit Judges

ORDER

The panel voted to deny appellant's petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and not active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are DENIED.

No. C 02 1107 CRB
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIMONELLI,
Plaintiff,
v.
UNIVERSITY OF CALIFORNIA-
BERKLEY,et al,
Defendants.

SETTLEMENT CONFERENCE BEFORE THE
HONORABLE MARIA E.JAMES
August 14th,2002

THE CLERK: Your Honor, we are calling Civil 021107, Simonelli versus UC Berkeley. Your Honor, this matter is before you far a further settlement conference.

Counsel, please state your appearances for the record.

MR. KATZENBACH: Chris Katzenbach on behalf of the Plaintiff.

MR. BYER: Good morning, Your Honor, Jeff Byer (phonetic) on behalf of defendants.

MR. LAFAYETTE: Gary Lafayette to on behalf of defendants.

THE COURT: (Inaudible). All right. Counsel, I understand we've reached a tentative agreement at this point. Who wants to place it on the record?

MR. KATZENBACH; I will do so, Your Honor.

THE COURT: Okay.

MR. KATZENBACH: Thank you very much. There is –

THE COURT: Would you mind coming and speak into the microphone because we are recording this and -- thank you.

MR. KATZENBACH: The parties, in further effort to resolve thiis case, have reached an interim solution that will take us through the fall semester of 2002, which will involve Mr. Simonelli taking three exams for courses which he has already taken, but has not taken the final exams.

Those courses are: Corporations 2, Securities Regulations 2, Mergers and Acquisitions in High Tech.

The parties have agreed, and Mr. Simonelli has agreed, to commence taking those exams with Corporations 2 as the first of the three. It will be his choice as to which of the remaining two, in what order he will take them.

It is the parties' understanding and expectation that Mr. Simonelli will complete those three exams during the fall semester, and that he will he terminated with the last exam by no later than January 9th of 2003.

The parties have further agreed that Mr. Simonelli will enroll in two law school courses during the Fall of 2002. And those courses are; Commercial Transactions and Estates and Trusts.

It is the parties' understanding and expectation that

Mr. Simonelli will not only enroll in those courses but that he will take and complete the final exams for those courses during the Fall semester of 2002. It is the parties' understanding, and it is Mr. Simonelli's expectation -- it is Mr. Simonelli's hope to complete both of those exams during the final exam week for the Fall semester of 2002, which commences on December 10th of 19- -- 2000, and ends on December 20th, 2002.

If it is not the University's requirement that he take the two exams during that period of time, and the parties' understand and agree that if Mr. Simonelli chose to complete those two exams during the exam week, he is -- he is waiving his rights to a one-week, time-off period between exams, which is reasonable accommodation which has been offered to him by the University.

The parties have agreed to this to assess whether or not it is feasible for Mr. Simonelli to proceed with his law school education in this case. And in exchange, the University, without waiving any rights or defenses available to it, will provide to Mr. Simonelli for those three exams and for the two courses, all of the compulsory reading material in 32 Point Type, separately paginated, spiral bound, in a timely manner. This Court has indulged the parties by offering u a status conference in early September for the purpose of assessing whether or not the parties are in agreement that Mr. Simonelli has received all of the written material in the manner in which the University has offered -- has agreed to provide.

The Court has also indulged the parties by offering a further settlement conference in early January of 2003

to assess the status of Mr. Simonelli's progress through the Fall 2002 semester.

It is the parties' hope that such a settlement conference would take place sometime between January 9th, 2003, the last date on which Mr. Simonelli will have concluded all of his exams, and January 22nd, 2003, which is the commencing date for the spring semester.

Ideally, the settlement conference should take place as soon after January 9th as is practicable, based on the schedules of the parties.

I believe I have articulated the parties' understanding and agreement.

THE COURT: All right.

MR. LAFAYETTE: Yes, your Honor, that is accurate.

THE COURT: All right. Okay. And this isn't really a binding agreement, but the University has agreed to enter -- you have authority to enter the University into this agreement; is that correct, Counsel.?

MR. LAFAYETTE: Yes, I do.

THE COURT: And Mr. Simonelli, you understand the agreement; isn't that correct?

MR. SIMONELLI : Yes.

THE COURT: And you agree to be bound by it?

MR. SIMONELLI: Yes.

THE COURT: Okay. And Counsel.

So we need the date in September. Do you want -- you said you wanted the first week of September.

MR. KATZENBACH: Yes, classes start, I believe, the 19th, so they are -- that would be about two weeks into the semester, and so we should have a good idea where we stand.

THE COURT: Okay. How about September 15th at around 11:00 -- I'm squeezing you in, o I could do it September 5th around 11:00 o'clock.

MR. LAFAYETTE: That would be fine, Your Honor.

MR. BYER: Could you squeeze us in on the day after, Your Honor?

THE COURT: Well, there is already somebody there. Is that a bad date?

MR. BYER: (Inaudible).

THE COURT: We have two settlement conferences, one at 10:00 o'clock and one at 2:00.

Do you want to --

MR. BYER: We'll work with it, we'll work with it. The 2:00 o'clock time on the day before is bad.

THE COURT: Oh, okay.

MR. BYER: I know that's bad.

THE COURT: And what's wrong with the 5th again, I'm sorry?

MR. BYER: It's a deposition, but we'll work around it.

THE COURT: What time is that?

MR. BYER: That's going to be an all-day deposition, but I will do something. I may move the deposition.

THE COURT: Okay. All right. Okay.

THE CLERK: September 5th at 11:00.

THE COURT: Okay. We don't have a lot of choices that week. It's a short week to begin with and --okay. So September 5th at 11:00 then.

UNIDENTIFIED SPEAKER: And then we'll pick a –

THE COURT: We can do the -- sorry. I have a short attention span. January, you want to set one for January?

MR. LAFAYETTE: Yes.

THE COURT: Why don't we do that already. You want it after the 9th? We should be pretty okay in January.

THE CLERK: January 13th or 14th.

THE COURT: All right. You can have January 13th in the afternoon, or you could have January 14th in the

morning.

MR. LAFAYETTE: Your Honor, the earlier the date the better.

THE COURT: How about January 13th at 2:00 -- is that a holiday, Brenda?

THE CLERK: There are holidays there.

THE COURT: We better make sure we know which –

THE CLERK: The 20th.

MR. LAFAYETTE: The 20th is Martin Luther King's birthday.
THE COURT: Okay. All right. All right. January 13th at 2:00 o'clock.

THE CLERK: And that would also be for status?

THE COURT: Yes, settlement conference and status. And Course, Counsel, in the meantime I would expect you to stay in contact with each other if problems arise.

MR. LAFAYETTE: Of course.

THE COURT: So that, you know -- and if there is nothing -- well, we'll just see you back here on the --5th even if -- I'll just have you come back in.

MR. LAFAYETTE: If there is anything we need to work out we can work it out.

THE COURT: Okay.

MR. LAFAYETTE: Thank you, Your Honor.

THE CLERK: All rise. This court now stands adjourned

(Whereupon, the proceedings were adjourned.)

Dated: March 19, 2003
No. C 02-1107 CRB (MEJ)
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIMONELLI,
Plaintiff,
v.
UNIVERSITY OF CALIFORNIA - BERKELEY,
Defendants.

ORDER RE COPYING AND ENLARGEMENT OF TEXT

The Court hereby makes the following Order:

As discussed, Mr. Simonelli shall bring his textbook (Creditor's Rights) to Copy Central by 5:00 p.m. today, March 19, 2003

The text shall be enlarged by 130% and shall be scanned to bring it up to 32 point font.

As it is too burdensome to reorganize the text by problem set, the text shall be copied straight through such that all bankruptcy codes are together. However, colored paper shall be used as a divider so that it is easier for Mr. Simonelli to decipher where on ends and the next begins.

IT IS SO ORDERED

_____/S/_____
MARIA-ELENA JAMES
United States Magistrate Judge

Dated: June 2, 2003
No. C 02-1107 CRB (MEJ)
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIMONELLI,
Plaintiff,
v.
UNIVERSITY OF CALIFORNIA - BERKELEY,
Defendants.

ORDER RE FURTHER MEDIATION

On June 2, 2003, the Court conducted a further mediation in the above referenced matter. Pursuant to said mediation, the Court hereby makes the following ORDER:

1. Defendant shall send Plaintiff notice of the upcoming medical examination including the date place, and time of said examination.

2. Plaintiff shall contact the Court no later than June 12, 2003 and indicate if there are any materials he has not received for Securities Regulations I or Legal Professions.

IT IS SO ORDERED.

/S/

MARIA-ELENA JAMES
United States Magistrate Judge